(3)

Supreme Court, U.S.
FILED
MAR 2 - 2004
OFFICE OF THE CLERK

No. 03-895

IN THE

Supreme Court of the United States

WALTER ROSALES, MARIE TOGGERY AND KAREN TOGGERY, PETITIONERS

v.

UNITED STATES OF AMERICA, U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS AND NATIONAL INDIAN GAMING COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

Patrick D. Webb, Esq.
Counsel of Record
WEBB & CAREY
401 B Street
Suite 306
San Diego, CA 92101
(619) 236-1650
Attorneys for Petitioners

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦ USSCINFO.COM

QUESTIONS PRESENTED FOR REVIEW

Whether a federally recognized Indian tribe is a necessary and indispensable party to an action by individual Indians to enforce their allotments of non-tribal land pursuant to 25 U.S.C. 345.

Whether individual Indians can be deprived of all rights and remedies provided by 25 U.S.C. 345, when a subsequently recognized Indian tribe falsely claims sovereignty over non-tribal land allotted to the individual Indians.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

I. THE GOVERNMENT STILL HAS ITS FACTS WRONG 1

II. PETITIONERS' RESPONSE TO THE GOVERNMENTS ARGUMENT 5

III. CONCLUSION 10

TABLE OF AUTHORITIES

CASES

ANTOINE v. U.S. (8TH CIR. 1981) 637 F.2D 1177 .....5, 6, 8

ARENAS v. U.S. (1944) 322 U.S. 419 5

CHASE v. MCMASTERS (8TH CIR. 1978) 573 F.2D 1011 7

CHRISTENSEN v. U.S. (D. NEV. 1983) 575 F. SUPP. 735 5

CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLA. v. COLLIER (10TH CIR. 1994) 17 F.3D 1292.....6, 8, 9

CITY OF TACOMA v. ANDRUS (D.D.C. 1978) 457 F. SUPP. 342 7

COAST INDIAN COMMUNITY v. U.S. ("COAST") (U.S.C.C. 1977) 550 F2D 639 .....2, 3, 9

DAVIS U.S. (9TH CIR. 1999) 192 F.3D 951 9

DUNBAR CORP. V. LINDSEY (4TH CIR. 1990) 905 F.2D 754 6

GERARD v. U.S. (9TH CIR. 1948) 167 F.2D 951 5

HY-YU-TSE-MIL-KIN v. SMITH (1902) 119 F. 114 5

KANSAS v. NORTON (10TH CIR. 2001) 249 F.3D 1213.....5, 6

NAVAJO TRIBE OF INDIANS v. NEW MEXICO (10TH CIR. 1987) 809 F.2D 1455 6

SAC & FOX NATION v. NORTON (10TH CIR.2001) 240 F.3D 1250 4

U.S. v. ARENAS (9TH CIR. 1947) 158 F.2D 730 5

U.S. v. CLARKE (9TH CIR. 1976) 529 F.2D 984 5

U.S. v. HEMMER (1916) 241 U.S. 379 7

UNITED STATES v. JACKSON, (1930) 280 U.S. 183 7

U.S. v. MOTTAZ (1986) 476 U.S. 834 ..... 1, 5

U.S. v. PIERCE (9TH CIR. 1956) 235 F.2D 885 5

U.S. v. STATE TAX COMM. (5TH CIR.1976) 535 F.2D 300 3

U.S. v. WASHINGTON (9TH CIR. 1956) 233 F.2D 811 7

WISCONSIN v. STOCKBRIDGE-MUNSEE COMMUNITY (E.D. WIS. 1999) 67 F.SUPP. 2D 990 ..... 4, 7

STATUTES AND OTHER AUTHORITIES

25 U.S.C. 334 5

25 U.S.C. 335 ..... *passim*

25 U.S.C. 345 ..... *passim*

25 U.S.C. 348 ..... 5, 7

25 U.S.C. 465 ..... 3, 7, 8, 9

25 U.S.C. 467 3

28 U.S.C. 1353 6

28 U.S.C. 2409a(a) 5

The Four Reservations Act ch. 48, 13 Stat. 39, 40 3

F.R.C.P. Rule 19 7

60 Fed. Reg. 9250 4

Cohen, Handbook of Federal Indian Law (DOI 1982) Ch. 1, at D3c, p.40-41 8

Cohen, Handbook of Federal Indian Law (DOI 1982) Ch. 1, Sec. D5, p. 45 ..... 3, 4

Cohen, Handbook of Federal Indian Law (DOI 1982) Ch. 11, Sec. B3, p. 617-18 7

Cohen, Handbook of Federal Indian Law (DOI 1982) Ch. 11, Sec. B6, p. 628 7

1 Opinions of the Solicitor of the DOI Relating to Infiand Affairs 1917-74 Memos. Sol. Int., 668 ..... 2, 3

1 Opinions of the Solicitor of the DOI Relating to Infiand Affairs 1917-74 Memos. Sol. Int., 724 2

1 Opinions of the Solicitor of the DOI Relating to Infiand Affairs 1917-74 Memos. Sol. Int., 747 2

1 Opinions of the Solicitor of the DOI Relating to Infiand Affairs 1917-74 Memos. Sol. Int., 1479..... 2

I. THE GOVERNMENT STILL HAS ITS FACTS WRONG

It is amazing to what degree the Government has gone to avoid review of the denial of Petitioners' rights and remedies under 25 U.S.C. 345 to enforce their allotments in trust Parcel 597-080-01 ("the Parcel"), due to a false claim of sovereignty and the BIA's failure to follow its own guidelines when taking property into trust for the benefit of individual Native Americans. The Government continues to make the same erroneous factual claims made below.

1. Petitioners do not claim to own Parcel 597-080-01 ("the Parcel"). It is undisputed that the United States holds title to the Parcel. Petitioners do not challenge the United States' title, which is why the Ninth Circuit did not rule on the Government's erroneous claim of sovereign immunity. Petitioners' complaint "seeks the issuance of an allotment" described in *U.S. v. Mottaz* (1986) 476 U.S. 834, 845. C.A.E.R. 15-16. Title 25 U.S.C. 345 waives sovereign immunity for Petitioners' suit, which seeks the "issuance" of the documentation "for" the allotment.

It is undisputed that the Government took the Parcel into trust for the benefit of "such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate." C.A.E.R. 21. It is undisputed that the Government failed to issue the allotments, which are generally issued as trust patents, not fee patents. Nor did the Government issue any other formal written designation of the specific half-blood Jamul Indians that were the trust beneficiaries of the Parcel.

It is also undisputed that the Tribe did not exist, had not been created under the I.R.A., and was not recognized, in 1978, when the Government accepted the

grant deed for the Parcel in trust for the individual Indians described therein. It also cannot be disputed that the Government failed to follow its own guidelines in recording the grant deed. 1 Opinions of the Solicitor of the Department of Interior Relating to Indian Affairs 1917-74 ("Mem. Sol. Int.") at 668, 724, 747, and 1479. Any transfer of the individual Petitioners' designated allotments to any subsequently recognized tribe, must still be accomplished by recording a grant deed. Here, no grant deed ever transferred the Petitioners' designated interest in the Parcel to any subsequently recognized tribe. *Coast Indian Community v. U.S.* (U.S.C.C. 1977) 550 F.2d 639, 651, n. 2, held on almost identical facts, that the parcel in question, "was not acquired for a tribe, leaving only the possibility under the [IRA] Act that it was purchased for individual Indians. The deed and proclamation say nothing to contradict this. Thus, the land was taken in trust for the individual Indians," as here.

As a matter of law, the Government is estopped by its own Solicitor's memoranda to deny that the Parcel is held in trust for the designated individual Indian beneficiaries, since the Government concedes that the "Jamul Indians of one-half degree or more Indian blood," were not recognized as a tribe in 1978. Memos. Sol. Int., at 668, 724, 747, and 1479; C.A.E.R.283-289. These memoranda admit that such trust acquisitions cannot be made for a "tribe" that does not yet exist.[1] There, Interior's Solicitor declared that a grant deed could not "designate" an un-recognized

[1] The Government failed to cite these memos to the District Court, which explains the District Court's erroneous findings, Gov. App. 1a, which were not adopted by the Ninth Circuit. Pet. App. 1a.

"tribe" as a beneficiary, since "there is in fact no existing tribe of Indians in Mississippi known as the Choctaw Tribe." Mem. Sol. Int., at 668. There, the Choctaw deed had to be amended and re-recorded to designate any subsequently recognized tribe a beneficiary, otherwise the property would remain in trust for the individual Indians, and not a tribe, as in *Coast*, 550 F.2d at 651.

U.S. v. State Tax Comm. (5th Cir. 1976) 535 F.2d 300, 304, similarly, holds that the absence of the words "then in trust for such organized tribe" in a relief act designating individual Choctaw beneficiaries meant that "only those individuals designated by the Interior Secretary were to have the benefit of this" designation, since "[n]either a tribe nor a reservation is mentioned."

2. The Government also fails to point out that the Interior Secretary's power to designate new Indian reservations under 25 U.S.C. 467, has not been used in California, since Congress specifically limited California to four Indian reservations in 1864, pursuant to The Four Reservations Act § 2, ch. 48, 13 Stat. 39, 40, and Congress never created an Indian reservation in Jamul. The Government's citation to a transmittal letter from a BIA realty officer suggesting a reservation may be established, C.A.E.R. 128, does not indicate that a reservation ever was established, and Interior's later memos indicate that none was established. C.A.E.R. 283-89.

Nor did the mere acquisition of land under 25 U.S.C. 465 somehow "establish" a reservation in Jamul. The Government's Handbook of Federal Indian Law ("Handbook") declares: "Any implication that lands purchased for tribes under section 5 of the IRA [25 U.S.C. 465] would constitute a reservation is negated by section 7 of that Act, 25 U.S.C. 467..." Ch. 1, Sec. D5,

page 45, fn. 158; *Sac & Fox Nation v. Norton* (10th Cir. 2001) 240 F.3d 1250, 1257; *Wisconsin v. Stockbridge-Munsee Community* (E.D. Wis. 1999) 67 F.Supp. 2d 990, 1003.

3. The Jamul Indian Village has never had jurisdiction over the Parcel, and there has never been a transfer of the Parcel or the allotments to the tribe. The Government erroneously implies that upon recognition of the tribe in 1981, the Village "claimed" jurisdiction over the Parcel. However, there is no evidence in the record of such a "claim." Contrary to the Ninth Circuit's erroneous assumption, Pet. App. 2a, there is no evidence in the record that the Jamul Indian Village ever "claimed jurisdiction over the Parcel." The Government's citation to the Jamul Indian Village constitution, C.A.E.R. 410, 414, is misleading. Though the constitution provides that Village jurisdiction "shall extend to all lands now within the confines of the Jamul Indian Village," C.A.E.R. 410, the Government conceded below that it has "no record of the 1978 trust parcel being known as the Jamul Indian Village." C.A.E.R. 177. There simply is no evidence in the record that the Parcel ever became subject to the jurisdiction of the subsequently recognized tribal governmental entity known as the Jamul Indian Village.

Moreover, the constitution does not describe any land within its jurisdiction; nor mention the Parcel, let alone provide any evidence that there was any land then "within the confines of the Jamul Indian Village." C.A.E.R. 410. The Jamul Indian Village is only a tribal governmental entity, and did not exist until its constitution was adopted in 1981. Similarly, the Federal Register listing of the tribe, 60 F.R. 9250, C.A.E.R. 266, does not create jurisdiction over the Parcel. "An Indian tribe's jurisdiction derives from the will of Congress,"

Kansas v. Norton (10th Cir. 2001) 249 F.3d 1213, 1229-31; Congress never granted "jurisdiction" over the Parcel to the subsequently recognized tribal governmental entity.

II. PETITIONERS' RESPONSE TO THE GOVERNMENT'S ARGUMENT

1. Contrary to the Government's assertion, Petitioners do not contend that the United States is "erroneously holding the Parcel in trust for the Jamul Indian Village." BIO 11. Rather, the Petitioners contend that the United States failed to properly issue the trust patents evidencing the Petitioners' allotments as designated beneficiaries of the trust Parcel, pursuant to 25 U.S.C. 334, 335, 345, 348 and 465. Petitioners do not claim that the United States "sold" or transferred the Parcel, as in *U.S. v. Mottaz* 476 U.S. 834 (1986). Rather, Petitioners make a claim "for" issuance of the documentation of their allotments. C.A.E.R. 14-16.

Petitioners do not challenge title to the Parcel. Title to the Parcel is held, as described in the grant deed. C.A.E.R. 21. Petitioners seek to enforce the "issuance of the allotments" for which they are the designated beneficiaries in the grant deed, just as in *U.S. v. Clarke* (9th Cir. 1976) 529 F.2d 984, 986; Arenas v. U.S. (1944) 322 U.S. 419, 432; *U.S. v. Arenas* (9th Cir. 1947) 158 F.2d 730, 746-47, and 749; *Gerard v. U.S.* (9th Cir. 1948) 167 F.2d 951, 952; *U.S. v. Pierce* (9th Cir. 1956) 235 F.2d 885, 888-91; *Antoine v. U.S.* (8th Cir. 1981) 637 F.2d 1177, 1181-82; *Christensen v. U.S.* (D. Nev. 1983) 575 F. Supp. 735, 737-38; which follow *Hy-Yu-Tse-Mil-Kin v. Smith* (1902) 119 F. 114, 115, affirmed, 194 U.S. 401 (1904).

The Government's assertion of the Quiet Title Act, 28 U.S.C. 2409a, was ignored by the Ninth Circuit, as it should be here. There is no authority that a claim

for allotment seeks an adjudication of title. "Thus, only disputes pertaining to the United States' ownership of real property fall within the parameters of the QTA." *Kansas*, at 1224. "Any challenge to a non-ownership interest in real property is not precluded by the QTA." *Dunbar Corp. V. Lindsey* (4th Cir. 1990) 905 F.2d 754, 759. *Navajo Tribe of Indians v. New Mexico* (10th Cir. 1987) 809 F.2d 1455, 1475, "adjudicating [] boundaries is conceptually quite distinct from adjudicating title to the same lands." As in the cases above, no individual Indian would have been allowed to claim their allotment, as a designated beneficiary of trust land, if the QTA barred such claims "for an allotment." Congress waived sovereign immunity for such claims in both 25 U.S.C. 345 and 28 U.S.C. 1353. "Because the action does not seek to quiet title to the tract, the QTA does not apply." *Kansas v. Norton, supra*, 249 F.3d at 1225.

2. Contrary to the Government's erroneous assertion, Petitioners not only cited and argued *Antoine v. U.S.* 637 F.2d 1177, 11781 (8th Cir. 1981), to the Ninth Circuit, but have steadfastly maintained throughout the proceedings below that determining whether an individual Indian should have received documentation for an allotment under section 345 requires no party other than the United States. C.A.AOB 17, ARB 26-30, C.A.E.R. 145, 251. See particularly, Petitioners' citation of *Citizen Band of Potawatomi Indian Tribe of Okla. v. Collier* (10th Cir. 1994) 17 F.3d 1292, 1294, in which the court found that no party other than the United States was required to litigate trust allotments, and that the Potawatomi tribe was not an indispensable party. ARB 27. Moreover, the Petitioners also argued below that there were alternatives to complete dismissal under F.R.C.P. Rule

19, including allowing the Government to assert any perceived interest of the tribe in response to the Petitioners' claims for damages. See, ARB 28, and the Petitioners' original claim and prayer for damages. C.A.E.R. 15-16.

3. Contrary to the Government's erroneous assertion, the Petitioners' claims for the issuance of their allotments in the Parcel do arise under 25 U.S.C. 345, pursuant to the cited statutory provisions, 25 U.S.C. 334, 335, 348, after acquisition of the Parcel under 25 U.S.C. 465. Following adoption of the IRA in 1934, the Government has routinely accepted private gifts of land in trust for the benefit of specific individual Indians under 25 U.S.C. 465. Such gifts are held in trust, and constitute "allotments" that are indistinguishable from any pre-1934 allotment. Such trust acquisitions under 25 U.S.C. 465 are treated as original "allotments." *U.S. v. Hemmer* (1916) 241 U.S. 379; *U.S. v. Washington* (9th Cir. 1956) 233 F.2d 811, 817; Handbook (DOI 1982) Ch. 11, Sec. B6, p. 628; see also for example, *Chase v. McMasters* (8th Cir. 1978) 573 F.2d 1011, 1016-17; *City of Tacoma v. Andrus* (D.D.C. 1978) 457 F.Supp. 342. Here, the Government cites no authority to the contrary, ignores its own treatise, and ignores 25 U.S.C. 335, which imposes the General Allotment Act on all subsequent trust acquisitions under 25 U.S.C. 465. Handbook (DOI 1982) Ch. 11, Sec. B3, p. 617-18; *U.S. v. Jackson*, 280 U.S. 183 (1930). See also, *Wisconsin v. Stockbridge-Munsee Community* (E.D. Wis. 1999) 67 F.Supp. 2d 990, 998, fn 3. "Statutes still in effect permit Indians to obtain allotments out of federal land. The General Allotment Act provides that nonreservation Indians settling on unappropriated federal lands are entitled to have the lands allotted to

them under the same terms as reservation allotments. 25 U.S.C. 334." Handbook., Ch. 11, Sec. B6, p. 627 (fn. omitted). "[S]ince 1934 [trust land acquisition for individual Indians] has been done pursuant to provisions of the IRA, 25 U.S.C. 465," and "[t]he status of such lands is indistinguishable from any other allotments and they should be treated alike. See 25 U.S.C. 335." Handbook Ch. 1, Sec. D3c, p. 40-41, fns. 118-19.

4. The Ninth Circuit's decision is still in conflict with the decisions of the Eighth and Tenth Circuits, where a tribe is not a necessary and indispensable party to an action to enforce an individual Indian's allotment under 25 U.S.C. 345. *Antoine v. United States ("Antoine")*, 637 F.2d 1177, 1181-82 (8th Cir. 1981); *Citizen Band Potawatomi Indian Tribe of Okla. v. Collier ("Potawatomi")*,17 F.3d 1292, 1294 (10th Cir. 1994).

Contrary to the Government's attempt to distinguish *Antoine*, the Petitioners' allotments in private property were acquired under 25 U.S.C. 465, and are "indistinguishable from any other allotments and they should be treated alike," 25 U.S.C. 335, Handbook Ch. 1, Sec. D3c, p. 40-41. They are therefore just as "true" as those in *Antoine*, where the United States was held to be the only necessary and indispensable defendant to an action to enforce the issuance of the allotment.

Moreover, here, it is undisputed that the Petitioners are in possession of their allotments in the Parcel. As noted above, there is no evidence in the record of any other party or tribe actually "claiming" an interest in, or jurisdiction over, the Parcel or the Petitioners' allotments. However, as in *Coast, supra*, 550 F.2d 639, 651, any such claim would be "patently

frivolous" had it been made, and therefore not a "legally protected interest." *Davis v. U.S.* (9th Cir. 1999) 192 F.3d 951, 959. Just as in *Antoine*, there is no other necessary party to this dispute, other than the United States.

In *Antoine*, as here, the United States was the "allotting agent," since the United States has title to the property. As noted above, there simply is no distinction between pre-1934 allotments, and post-1934 allotments of private property acquired under 25 U.S.C. 465, as described in the grant deed here. C.A.E.R. 21. They are indistinguishable. Moreover, Petitioners have consistently sought damages, since the filing of the original complaint, in the alternative that the Government is not compelled to issue the proper documentation of their allotments in the Parcel. C.A.E.R. 15-16. Hence, the facts of *Antoine* are directly on point, and the decision directly in conflict with the Ninth Circuit's decision here.

Remarkably, the Government's attempt to distinguish *Potawatomi*, *supra*, 17 F.3d 1292, 1294 is even less on point, and actually concedes the existence of the conflict with the Ninth Circuit, where, as here, the tribe has no present interest in the Parcel. The Government concedes that where the tribe has "merely an expectation" in the property in question, it is not an indispensable party to an individual Indian's claim for an allotment under 25 U.S.C. 345. BIO 20.

There is no evidence in the record that the tribe claims an interest in the Parcel. The Ninth Circuit's assertion of such a "claim" of jurisdiction, is at best, erroneous, and was not supported by any citation to the record. Pet. App. 2a. The tribe never sought to intervene and make such a claim in the underlying action, even though its lawyer was present at every

hearing. Most importantly, the Government admits it has "no record of the 1978 trust parcel being known as the Jamul Indian Village." C.A.E.R. 177. There simply is no evidence in the record that the Parcel is, or ever was, subject to the jurisdiction of the subsequently recognized tribal governmental entity known as the Jamul Indian Village.

III. CONCLUSION

Therefore, as in *Potawatomi*, since the tribe "merely has an expectation," and, at best, a "patently frivolous" claim to the Parcel, the tribe is not an indispensable party. This petition should be granted, and the Ninth Circuit's conflicting decision should be reversed and remanded for trial.

Respectfully submitted

Patrick D. Webb, Esq.
Counsel of Record
WEBB & CAREY
401 B Street
Suite 306
San Diego, CA 92101
(619) 236-1650
Attorneys for Petitioners